No. 20-56075

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY BARKE, et al.,
Plaintiffs and Appellants,

v.

ERIC BANKS, et al.,
Defendants and Appellees,

and

CALIFORNIA TEACHERS ASSOCIATION, et al.,
Intervenor-Defendants and Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 8:20-cv-00358-JLS-ADS, Hon. Josephine L. Staton

UNION APPELLEES' ANSWERING BRIEF

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellees California Teachers Association, SEIU California State Council, California Federation of Teachers, California School Employees Association, and California Labor Federation are labor organizations that have no parent corporations or any stock held by any publicly held corporation.

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INTRODUCTION

Plaintiffs are seven individuals who serve on local government boards. They brought suit to enjoin California's Public Employment Relations Board ("PERB") from enforcing California Government Code §3550 against Plaintiffs, on the theory that such enforcement would violate the First Amendment. Yet no such enforcement is possible. Section 3550 regulates "public employers"—i.e., political subdivisions of the State—not individual public employees or officials. Plaintiffs' actual request, therefore, is for a court order enjoining PERB from enforcing §3550 against the government entities with which Plaintiffs are affiliated—despite the well-established principle that a state's regulation of its own political subdivisions, including their government speech, does not implicate the First Amendment.

As the District Court held, Plaintiffs have no standing to bring a pre-enforcement challenge to §3550, because §3550 is not enforceable against them and does not regulate their personal speech. This Court held in *Leonard v. Clark*, 12 F.3d 885, 888-89 (9th Cir. 1993), *as amended* Mar. 8, 1994, that individual elected board members lack standing to bring a pre-enforcement challenge to a speech limitation that applies only to an entity, not its individual leaders. *Leonard* controls this case. Plaintiffs' asserted "feelings" that their personal speech is "chilled" by the government's regulation of its own political subdivisions do not establish Article III injury.

The District Court also correctly held that Plaintiffs' claims are not ripe for judicial review, because they are based on speculation. No charges under §3550 have been filed or threatened against Plaintiffs. Nor has PERB ever held a public employer responsible for violating §3550 based on the personal speech of the public employer's officials. When Plaintiffs brought this lawsuit, PERB had never even interpreted §3550. And Plaintiffs failed to identify any concrete instance of speech they intend to make that would be both prohibited by §3550 and protected by the First Amendment. Withholding review until an actual dispute arises based on real facts, rather than speculation, will not cause Plaintiffs hardship because §3550 applies only to political subdivisions and does not regulate Plaintiffs' personal speech.

Accordingly, this Court should affirm the dismissal of Plaintiffs' claims for lack of jurisdiction.

JURISDICTIONAL STATEMENT

Plaintiffs' jurisdictional statement is correct, except the District Court correctly held that federal courts lack Article III jurisdiction over Plaintiffs' claims.

RELEVANT STATUTE

California Government Code §3550 provides:

> A public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues

or fee deductions to an employee organization. This is declaratory of existing law.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs lack standing to bring this pre-enforcement challenge to California Government Code §3550, where §3550 by its terms does not apply to them, there is no likelihood that the statute will be enforced against them, and they failed to identify any concrete plan to engage in speech that would be both prohibited by §3550 and protected by the First Amendment.

2. Whether Plaintiffs' pre-enforcement challenge to §3550 is not ripe where Plaintiffs' claims do not arise in a concrete factual context and Plaintiffs would not suffer hardship from delaying resolution.

3. Whether the District Court correctly dismissed the complaint without leave to amend because amendment would be futile.

STATEMENT OF THE CASE

A. Background

1. California Public Sector Collective Bargaining

Labor-management relations for California's public employers and employees are governed by state statutes. *See Coachella Valley Mosquito & Vector Control Dist. v. Cal. PERB*, 35 Cal.4th 1072, 1083-86 (2005). The Educational Employment Relations Act ("EERA") (Cal. Gov. Code §3540 et seq.) applies to school and community college districts, and the Meyers-Milias-Brown Act

("MMBA") (*id.* §3500 et seq.) applies to cities and local special districts. These statutes advance the State's interests in "promot[ing] the improvement of personnel management and employer-employee relations within the various public agencies in the State…." *Id.* §3500(a) (MMBA); *see id.* §3540 (EERA).

Under the EERA and MMBA, public employees "have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." *Id.* §§3543(a), 3502. When a unit of employees democratically chooses an organization to serve as the unit's collective bargaining representative, the public employer must meet and confer with that representative regarding terms and conditions of employment. *Id.* §§3543.2, 3543.7, 3505. Public employers are prohibited from "discriminat[ing]" against or "coerc[ing]" public employees for exercising rights protected by the EERA or MMBA. *Id.* §§3543.5(a), 3506, 3506.5(a).

State law vests PERB with exclusive jurisdiction to resolve unfair practice charges under these statutes. *Id.* §§3541.3(i), 3541.5(a), 3509(a); *see City of San Jose v. Operating Eng'rs Local Union No. 3*, 49 Cal.4th 597, 606 (2010). PERB's General Counsel files complaints against unions or public employers if a charging party's submission "is sufficient to establish a prima facie case." 8 C.C.R. §32640(a); *see* Cal. Gov. Code §3541.5. The complaint is heard by an

administrative law judge. 8 C.C.R. §§32680, 32168. An aggrieved party can seek review of the administrative law judge's decision before PERB. *Id.* §§32300, 32320. If PERB finds that a party committed an unfair practice, PERB can order a remedy, including a "cease and desist" order. Cal. Gov. Code §3541.5(c); 8 C.C.R. §32325. But PERB has no authority to enforce such an order. Rather, PERB must seek a court injunction to enforce its rulings. 8 C.C.R. §§32450-32465, 32980. A party aggrieved by a final PERB decision may also seek judicial review in the California court of appeal. Cal. Gov. Code §3509.5.

2. Government Code §3550

Section 3550 is one of the PERB-administered labor-management relations statutes. Section 3550 provides, in pertinent part:

> A *public employer* shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization.… [emphasis added][1]

As relevant here, the term "public employer" in §3550 means an "employer subject to" the EERA or MMBA. Cal. Gov. Code §3552(c). The "employers" subject to the EERA and MMBA are political subdivisions of the State, not their

[1] Section 3550 was adopted in 2017 and amended in 2018. The 2018 amendment clarified the statutory language and added a final sentence: "This is declaratory of existing law." The Legislature likely meant that the 2018 amendment was "declaratory of existing law." *See* Cal. Stats. 2017, c. 567 (S.B. 285), §1; Cal. Stats. 2018, c. 53 (S.B. 866), §11.

individual officers or employees. *See id.* §3540.1(k) (EERA); *id.* §3501(c) (MMBA). Plaintiffs concede they are *not* §3550 "public employers." 3-ER-612.

Thus, §3550 regulates only the government's own activities. The statute implements the State's policy determination that "public employees [should] remain free to exercise their personal choice as to whether or not to become union members, without being deterred or discouraged from doing so *by their employer*." Cal. Bill Analysis, S.B. 285, Assembly Comm. on Public Employees, Retirement, and Social Security (Jun. 21, 2017) (emphasis added).

On March 1, 2021, after Plaintiffs filed their opening brief in this appeal, PERB decided consolidated cases construing §3550 for the first time. *See Regents of the Univ. of Cal.*, PERB Decision Nos. 2755-H & 2756-H (March 1, 2021). PERB "treat[ed] section 3550 even-handedly" and held that §3550 "prohibit[s] public employer conduct which tends to influence employee choices as to *whether or not* to authorize representation, become or remain a union member, or commence or continue paying dues or fees." PERB Decision No. 2755-H at 3-4 (emphasis in original); *see id.* at 21 ("'deter or discourage' means to tend to influence an employee's free choice regarding whether or not to"). California courts grant substantial deference to PERB's interpretation of PERB-administered statutes. *Boling v. PERB*, 5 Cal.5th 898, 911-12 (2018).

3. Plaintiffs' Lawsuit

Plaintiffs are seven individuals who serve on local government boards. 4-ER-631-633 ¶¶12-18. They filed suit on February 21, 2020, asserting a single claim against PERB's four Board Members and General Counsel alleging that §3550 violates the First Amendment. 4-ER-642-643 ¶¶39-44. Plaintiffs also filed a motion for a preliminary injunction to prevent PERB from enforcing §3550 "against Plaintiffs." 3-ER-587.

Plaintiffs did not allege that they faced any threat of personal liability from §3550. Nor could they. As Plaintiffs concede, the statute applies to "public employer[s]," not individual board members. Plaintiffs also did not allege that there has been any instance in which any charging party filed or threatened to file a PERB charge alleging that a public employer violated §3550 because of speech by a member of a local government representative body.

Instead, in their complaint and the declarations they submitted in support of their preliminary injunction motion, 3-ER-477-585,[2] Plaintiffs relied entirely on (1) their own assertions that they are personally uncertain of §3550's meaning and

[2] Plaintiffs' declarations were not incorporated into the complaint. But because the District Court considered the declarations and granted the motion to dismiss without leave to amend, *infra* at 55-57, we address the facts asserted in Plaintiffs' declarations as if they were alleged in the complaint. *Cf. Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (district court may consider evidence outside complaint to resolve Fed. R. Civ. P. 12(b)(1) motion).

"feel" that its existence limits their speech, 3-ER-572-573 ¶¶9-14; 3-ER-566-569 ¶¶6-11, 13, 15-17; 3-ER-558-560 ¶¶5-8, 11; 3-ER-548-552 ¶¶4-6, 9, 12-20, 24; 3-ER-525-532 ¶¶5-9, 12, 30, 34, 38; 3-ER-521-523 ¶¶4-6, 8-9, 13; 3-ER-517-519 ¶¶6-8, 12, 14-15, 17; and (2) statements by private management-side labor attorneys regarding arguments that hypothetically might be made about §3550's meaning. 3-ER-527-530 ¶¶16-21, 24-29; 3-ER-575-577; 3-ER-578-585.[3]

B. Proceedings Below

After Plaintiffs filed their complaint, the Unions were granted leave to intervene as additional Defendants. 4-ER-690.[4] On August 25, 2020, the District Court granted Defendants' motion to dismiss and denied Plaintiffs' preliminary injunction motion as moot. 1-ER-3-21.

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[3] The only evidence Plaintiffs submitted of anyone asserting that anything a Plaintiff did violated state law is a letter from a local union to the San Clemente City Manager asserting that Plaintiff Ferguson's threatening official email seeking private information about the local union and its officers likely constituted an unfair practice. 3-ER-563. The letter did not make any reference to §3550 or to personal liability for Ferguson, but rather requested that the City cease and desist from "attempts to interfere with, intimidate, restrain, coerce or discriminate against" the union and its members. *Id.* The MMBA has provided since 1961 that "[p]ublic agencies … shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights." Cal. Gov. Code §3506; *see also id.* §§3506.5, 3543.5(a). This letter suggesting a violation of §3506, which has existed for 60 years, is irrelevant to Plaintiffs' challenge to §3550.

[4] The Unions are: California Teachers Association, SEIU California State Council, California Federation of Teachers, California School Employees Association, and California Labor Federation.

The District Court held that Plaintiffs lack standing to challenge §3550 because "Plaintiffs' allegations … fail to establish a sufficient injury in fact or credible threat of adverse state action to satisfy the demands of Article III." 1-ER-10. The District Court held that "Plaintiffs have not satisfied any of the three interrelated *Lopez* inquiries" that this Court conducts "in determining 'whether plaintiffs who bring suit prior to violating a statute … have failed to show that they face a credible threat of adverse state action sufficient to establish standing.'" 1-ER-10, 16 (quoting *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010)).

The District Court explained: First, "the challenged law is inapplicable to the plaintiffs," *Lopez*, 630 F.3d at 786, because "it is undisputed that Section 3550, by its own terms, directly applies to 'public employers' and not their officials." 1-ER-10. Second, because a PERB proceeding could only be instituted against public employers, not their officials, Plaintiffs "failed to show a reasonable likelihood that the government will enforce the challenged law against them." 1-ER-12. Third, Plaintiffs failed to "provide the necessary details as to the content of their own proposed future public statements or the specific circumstances surrounding the statements' contemplated publication" to allow the District Court to evaluate Plaintiffs' claims in an actual concrete factual context without resorting to speculation. 1-ER-15.

The District Court also held that Plaintiffs' claims were not ripe. 1-ER-17-20. The District Court explained that "to provide a record fit for judicial review, 'a party bringing a pre[-]enforcement challenge must … present a concrete factual situation ... to delineate the boundaries of what conduct the government may or may not regulate without running afoul of the Constitution.'" 1-ER-18 (quoting *Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007)) (some internal quotation marks omitted). But Plaintiffs offered only "ambiguous descriptions of how they have 'held their tongues' and the statements they intend to make, while asking the Court to enjoin PERB from enforcing a statute that (1) is not directly applicable to Plaintiffs and (2) PERB has yet to construe." 1-ER-19. The District Court reasoned that "[t]his is the epitome of a 'sketchy record'—one 'with many unknown facts' and not presently fit for judicial review." 1-ER-19 (citing *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000) (en banc)). The District Court also reasoned that Plaintiffs "have not demonstrated any hardship that would result from withholding judicial review" because §3550 is not enforceable against Plaintiffs. 1-ER-20.

The District Court dismissed the complaint without leave to amend because, "[a]s Plaintiffs' Complaint fails in large part due to the inapplicability of Section 3550 to Plaintiffs, and the Article III issues that flow therefrom, amendment would be futile." 1-ER-21.

STANDARD OF REVIEW

This Court reviews a district court's standing and ripeness determinations de novo. *Desert Water Agency v. United States Dep't of the Interior*, 849 F.3d 1250, 1253 (9th Cir. 2017). Plaintiffs bear the burden of establishing that they have standing, *Lopez*, 630 F.3d at 785, and that their claims are ripe, *Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000).

SUMMARY OF ARGUMENT

1. The District Court correctly held that Plaintiffs lack standing to bring a pre-enforcement challenge to §3550. Section 3550 does not apply to Plaintiffs; there is no reasonable possibility the government will enforce the statute against them; and they have not alleged in any concrete detail an intent to engage in speech that would both violate §3550 and be protected by the First Amendment. *See Lopez*, 630 F.3d at 785-86.

Plaintiffs concede that they are not §3550 "public employers," but they argue that they have standing because the statute could be applied to a *public employer* based on Plaintiffs' speech. Under *Leonard v. Clark*, 12 F.3d at 888-89, however, individual elected board members or agents of an entity have no standing to challenge a restriction that applies by its terms to only the entity. *Leonard* controls this case.

Plaintiffs urge that §3550 "chills" their personal speech because they are concerned that their speech might be (erroneously) attributed to their government agencies. But standard agency principles would apply to determine when an individual government official is speaking on behalf of the government for purposes of §3550. Those same familiar agency principles applied in *Leonard* and apply to essentially every regulation of an organization, association, or government instrumentality. Plaintiffs' subjective fear that PERB and the state courts would incorrectly apply agency principles in adjudicating a hypothetical future unfair practice charge against a government entity does not constitute Article III injury in fact. It is also entirely speculative and far too remote a possibility to satisfy Article III's requirement that Plaintiffs establish a "*genuine* threat of *imminent*" personal harm. *Wolfson v. Brammer*, 616 F.3d 1045, 1063 (9th Cir. 2010) (emphases in original; citation omitted).

2. The District Court also correctly held that Plaintiffs' claims are not ripe. Plaintiffs have failed to present a concrete factual context to evaluate their constitutional claims, because they have failed to identify any specific speech they intend to make that is both prohibited by §3550 and protected by the First Amendment. Plaintiffs also suffer no hardship from delaying resolution of their claims until an actual factual dispute arises, because §3550 does not restrict their personal speech.

3. The District Court correctly dismissed the complaint without leave to amend because amendment would be futile.

ARGUMENT

I. Plaintiffs Lack Standing to Challenge §3550.

A. Plaintiffs lack standing to bring a pre-enforcement challenge under *Lopez* and *Leonard*.

To invoke the federal courts' jurisdiction, a plaintiff must establish "the irreducible constitutional minimum of standing," consisting of injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "The injury in fact must constitute 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Lopez*, 630 F.3d at 785 (quoting *Lujan,* 504 U.S. at 560).

To determine whether plaintiffs bringing pre-enforcement First Amendment claims "have failed to show that they face a credible threat of adverse state action sufficient to establish standing," this Court considers three interrelated inquiries: (1) "whether pre-enforcement plaintiffs have failed to show a reasonable likelihood that the government will enforce the challenged law against them"; (2) "whether the plaintiffs have failed to establish, with some degree of concrete detail, that they intend to violate the challenged law"; and (3) "whether the challenged law is inapplicable to the plaintiffs, either by its terms or as interpreted by the

government." *Id.* at 786. "Such inapplicability weighs against both the plaintiffs' claims that they intend to violate the law, and also their claims that the government intends to enforce the law against them." *Id.* As the District Court correctly held, consideration of these factors establishes that Plaintiffs lack standing. 1-ER-9-10.

1. Section 3550 is inapplicable to Plaintiffs.

The third *Lopez* factor is most critical here: Plaintiffs have no standing to bring a pre-enforcement challenge to §3550 because the statute does not apply to their speech as individuals. 1-ER-10. Section 3550 applies only to government entities ("public employers"). In *Leonard v. Clark*, 12 F.3d at 888-89, this Court held that individual leaders or agents of an entity have no standing to challenge a speech limitation that applies by its terms only to that entity. *Leonard* is "directly on point," and forecloses Plaintiffs' claims. 1-ER-11.

Leonard held that four union leaders—including the union's elected president, secretary-treasurer, and members of its executive board and negotiating team—"did not have standing to challenge a portion of their union's collective bargaining agreement" that restricted speech "because the provision at issue 'by its plain language applie[d] only to the Union and not to its individual members.'" *Lopez*, 630 F.3d at 788 (quoting *Leonard*, 12 F.3d at 888-89). While the challenged provision would limit the plaintiffs' ability to speak *on behalf of the union*, the plaintiffs nevertheless had no standing to challenge that provision because they

"ha[d] not shown that [the provision] in any way inhibits their freedom to speak as *individuals*." *Leonard*, 12 F.3d at 888 (emphasis in original).

Leonard explained that, because the collective bargaining agreement provision would "be triggered only if the plaintiffs speak on behalf of the Union … the only chill implicating the First Amendment" was "on the speech of these agents when they act under authority from their principal, the Union." *Id.* at 889 (citing Restatement (Second) of Agency §§26-27, 33 (1958)). While the *union* could "colorably assert a threatened injury to its authority" (which this Court rejected on the merits), the individual plaintiffs could not. *Id.* "The individual plaintiffs' speech could be affected only if, as individual union members, they wished to claim authority to speak for the Union when they did not possess it. However, such a 'chill' does not implicate First Amendment rights at all," because the plaintiffs had no right to falsely claim authority to speak for an entity when they did not possess that authority. *Id.* This Court concluded that "[t]he individual plaintiffs [thus] have not alleged the *personal* actual or threatened injury necessary to gain standing in federal court." *Id.* (emphasis in original); *see also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 536, 543-44 & n.6 (1986) (school board member had no standing to appeal order against board because he had "no personal stake" in outcome of litigation; "an individual Board member cannot invoke the Board's interest … to confer standing upon himself"); *cf. Alaska Right*

to Life Pol. Action Comm. v. Feldman, 504 F.3d 840, 851 (9th Cir. 2007) (rejecting as unripe First Amendment challenge to law that by its terms could not be enforced against plaintiff organization, explaining that "[b]ecause the organization would not itself have risked civil sanction or criminal penalty, it has not 'suffered the constitutionally recognized injury of self-censorship'") (citation omitted).

The same reasoning precludes Plaintiffs' claims here. Section 3550 applies only to "public employer[s]." Plaintiffs concede the law does not apply to them as individuals. 3-ER-612; *see Santa Maria-Bonita Sch. Dist.*, PERB Order No. Ad-400, at 5 (July 9, 2013) ("[School] District falls within the definition of 'public school employer' or 'employer' under EERA," but "an elected official on the governing body of the District … does not.").

Plaintiffs complain that §3550 "provides no guidance whatsoever as to … whether what [Plaintiffs] say will be imputed to the public employers." AOB at 36. But it is well-established that PERB and the California courts construe labor-relations statutes like §3550 to impose liability on a "public employer" only for acts taken by the public employer's actual or ostensible agents, when acting within the scope of the authority that the employer has delegated to that agent. Indeed, Plaintiffs concede that standard rules of agency apply. AOB at 26 ("Any violation of Section 3550 must … be based on statements made with the actual or apparent authority of the public employer.").

For example, *Inglewood Teachers Ass'n v. PERB*, 227 Cal.App.3d 767, 774-75 (1991), addressed another EERA provision that regulates the actions of "public … employer[s]," Cal. Gov. Code §3543.5. The Court of Appeal agreed with PERB that a school district was *not* responsible for actions taken by a school principal. The school principal had filed a lawsuit against individual teachers and their union in alleged retaliation for protected activity. *Inglewood Teachers Ass'n*, 227 Cal.App.3d at 779. The Court of Appeal agreed with PERB that agency principles applied, and that, even though the school principal was an agent of the school district for some purposes, his lawsuit did not expose the district to unfair practice liability because he was not "acting within the scope of his authority when he filed the lawsuit"; the district had not "expressly authorized [him] to file the lawsuit"; "the evidence did not justify a finding that [the principal] had ostensible or apparent authority to file the lawsuit" on the district's behalf; and there was no evidence that the district "condoned or ratified the lawsuit." *Id.* at 781, 783 (citing Cal. Civ. Code §§2316, 2317).[5]

[5] By contrast, in *Boling v. PERB*, 5 Cal.5th 898, 904-09, 919 (2018), a City was held responsible for violating an MMBA provision that required its "designated" "representatives" to meet and confer with a union because the facts showed that the Mayor (who was the City's designated bargaining representative) was acting on behalf of the City when he bypassed the union and the city council ratified his conduct. Further, the statute in *Boling* "expressly impose[d] the duty to meet and confer on '[t]he governing body of a public agency, or such boards, commissions, *administrative officers or other representatives as may be properly*

Plaintiffs cite two instances in PERB's history in which PERB concluded that a public employer had committed an unfair practice because of actions taken by members of the employer's governing board. AOB at 26 n.4. In both cases, the particular facts established that the governing board members were acting as agents of the public employer, not in their personal capacity.[6] *See also Santa Maria-Bonita Sch. Dist.*, PERB Order No. Ad-400, at 5-6 (where charge against school district concerned conduct of board member, "the issue … is whether the conduct

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designated by law or by such governing body.'" 5 Cal.5th at 917 (quoting Cal. Gov. Code §3505; emphasis in *Boling*).

[6] *San Diego Unified School District*, PERB Decision No. 137 (June 19, 1980), held that a school district engaged in unlawful reprisals against employees who had participated in a strike under Cal. Gov. Code §3543.5(a), when two board members placed formal letters of commendation in the official personnel files of non-striking employees. The commendation letters were the action "of the employer" because, among other things, the letters were "prepared on official stationary, using the board members' titles," the letters could be "considered as a factor affecting employee promotional opportunities," and "District managerial employees [including the superintendent] authoriz[ed] placement of the letters in personnel folders." *Id.* at 3, 7. The letters thus were not simply personal statements from the individual board members.

County of Riverside, PERB Decision No. 2119-M (June 24, 2010), held that a county unlawfully "interfered" with employees' rights under Cal. Gov. Code §3506 when, in direct response to a union organizing campaign by "TAP" employees, three Board of Supervisors members (a majority of the Board) threatened a TAP representative during an official meeting that the Board would eliminate all the TAP employees and replace them with private contractors if the employees insisted on unionizing. The Board members threatened to take (and had the power to take) formal action on behalf of the County. It appears from PERB's opinion that the County did not contest that the Board members were acting as the County's agents when making these threats. PERB thus concluded that the *County* "through [its] agents" threatened employees with the loss of their jobs. *Id.* at 24.

of the individual may be imputed to the body … by operation of an agency relationship").[7]

Section 3550 thus does not regulate Plaintiffs' right "to speak as *individuals*." *Leonard*, 12 F.3d at 888 (emphasis in original). For present purposes, the elected union board members in *Leonard* are not relevantly distinguishable from elected government board members. They have an interest in representing their constituents, communicating openly, and debating policy matters. But they do not have a First Amendment right to speak *on behalf of* the entity they help govern, *see infra* at 29-32, and thus suffer no *personal* injury from restrictions on the speech of the entity itself.

[7] Plaintiffs also cite the ALJ ruling in *Santa Maria-Bonita Sch. Dist.*, 37 PERC ¶20, 2013 WL 2105948 (Apr. 18, 2013) (AOB at 44), but PERB did not review the substance of that ruling, and in any event the ALJ concluded that a school board member acted as an agent of a school district not simply because he was a board member, but because he "used his position on the Board of Trustees to intimidate," "interfere with," and threaten union leaders, implying by his actions that he "would find a way to use his authority as a Trustee to harm the Association." Among other things, the board member unlawfully surveilled associational activity at a protest outside the school district office by emerging directly from the district office to record participants on his phone, and he signed threatening emails to the union's president "using his full title as a District Board Trustee, … impl[ying] that any action he took [in reprisal against the union president] would be pursuant to his authority in that capacity." *Id.*

2. There is no likelihood that the government will enforce §3550 against Plaintiffs.

Consideration of the second *Lopez* factor reinforces Plaintiffs' lack of standing, because Plaintiffs have "failed to show a reasonable likelihood that the government will enforce [§3550] against them." 630 F.3d at 786. Plaintiffs do not dispute that §3550 is not enforceable against them personally. And PERB also has never sought to enforce §3550 against any public employer based on the personal speech of an individual member of the employer's governing board. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1140-41 (9th Cir. 2000) (en banc) (no standing to challenge statute where "the record of past enforcement is limited, was civil only, not criminal, and in any event was in each case precipitated by the filing of complaints by potential tenants," and no such complaints had been filed against plaintiff); *Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir. 1983) (teachers had no standing to challenge state law prohibiting use of certain textbooks in schools where no teacher had been charged with violating law or denied permission to use any textbook).

Plaintiffs rely entirely on their own assertions that they "feel" inhibited by the mere existence of §3550. *E.g.*, 3-ER-574 ¶17.[8] Plaintiffs assert that they "have

[8] Plaintiffs do not allege that the public employers on whose boards they sit have limited Plaintiffs' speech. Plaintiff Barke asserts that the Los Alamitos Unified School District Board "adopted a policy that restricted the speech of Board

standing if they self-censor – *i.e.*, they would like to speak, but for fear of consequences, do not." AOB at 38. But "[m]ere '[a]llegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" *Lopez*, 630 F.3d at 787 (quoting *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972)). As in *Lopez*, Plaintiffs' bald assertions that their speech is chilled by the existence of §3550 do not give them standing: "[S]elf-censorship alone is insufficient to show injury." *Id.* at 792. Rather, the "potential plaintiff must have 'an actual and well-founded fear that the law will be enforced against [him or her].'" *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (brackets in original; citation omitted). "In the free speech context, such a fear of prosecution will only inure if the plaintiff's intended speech arguably falls within the statute's reach." *Id.* Section 3550 does not reach Plaintiffs' individual speech. *Supra* at 14-19.[9]

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members," 3-ER-568 ¶12, but Barke is no longer a member of that Board. ER-566 ¶3. Plaintiff Yarbrough asserts that he was "told by staff" not to speak to union employees about *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018), but not that he could not speak in his personal capacity or that he would face any personal repercussions if he did so. 3-ER-523 ¶¶11-12. In any event, even if the public employers on whose boards Plaintiffs sit sought to limit Plaintiffs' personal speech, that would not establish standing for Plaintiffs to sue *PERB*.

[9] Plaintiffs' citations to *Arizona Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003), *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014) (AOB at 37-38, 53-54 n.9), do not support their claims. The challenged

Plaintiffs speculate that (a) something a Plaintiff might say could be attributed to the public employer with which the Plaintiff is affiliated; (b) a charge might then be filed against that employer; (c) in adjudicating that charge, PERB might conclude that the *public employer* (not the Plaintiff) had committed an unfair practice; (d) PERB might then order the public employer and its agents to cease and desist from further violations of §3550; (e) that order would apply to the Plaintiff *when acting as the public employer's agent*; (f) the Plaintiff might violate that order by speaking *on behalf of the government*; and (g) PERB might then seek civil contempt sanctions against a Plaintiff from a state court based on that violation—though Plaintiffs have failed to identify any instance in which PERB has ever sought civil contempt sanctions against an individual agent of a public employer for violating a PERB cease and desist order in any context, let alone one involving an elected government official or a claim under §3550. AOB at 25-26, 41. That attenuated causal chain, building hypothetical upon hypothetical and involving no threat of personal liability under §3550 for any Plaintiff, does not

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statutes in each of those cases directly regulated the plaintiffs' speech, and the plaintiffs "faced a reasonable risk that [they] would be subject to civil penalties for violation of the statute." *Arizona Right to Life*, 320 F.3d at 1007; *see Sec'y of State of Md.*, 467 U.S. at 954-55 (Secretary of State informed plaintiff corporation it would be prosecuted if it failed to comply with challenged statute); *Susan B. Anthony List*, 573 U.S. at 164-65 (plaintiff organization had already been subject to complaint, and commission had already found probable cause that plaintiff violated challenged statute).

establish that Plaintiffs personally face a "*genuine* threat of *imminent* prosecution" under §3550. *Wolfson v. Brammer*, 616 F.3d 1045, 1063 (9th Cir. 2010) (emphases in original; citation omitted). "[Plaintiffs'] fear concerns a *possibility*" and therefore fails to establish injury under Article III. *Id.* (emphasis in original).[10]

3. Plaintiffs failed to allege any concrete intent to engage in speech that is both prohibited by §3550 and protected by the First Amendment.

The final *Lopez* factor also weighs against standing because Plaintiffs have "failed to establish, with some degree of concrete detail, that they intend to violate [§3550]." 630 F.3d at 786. "Because 'the Constitution requires something more than a hypothetical intent to violate the law,' plaintiffs must 'articulate[] a "concrete plan" to violate the law in question' by giving details about their future speech such as 'when, to whom, where, or under what circumstances.'" *Id.* at 787

[10] Plaintiffs argue that "Section 3550's unconstitutional vagueness *is* the source of its Article III injury." AOB at 17 (citing *U.S. v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996)). The argument confuses standing and the merits of a First Amendment void-for-vagueness challenge. *Wunsch* was an appeal of a sanctions order imposed on an attorney for violating certain court rules. The appellant suffered a direct personal injury from the sanctions order. On the merits, the Court held that the rule under which the attorney was sanctioned was unconstitutionally vague. *Wunsch*, 84 F.3d at 1119-20. The case has no bearing here because §3550 does not apply to Plaintiffs' personal speech, and Plaintiffs cannot be sanctioned for violating §3550. Moreover, the premise of Plaintiffs' void-for-vagueness challenge—that the meaning of "deter or discourage" in §3550 is unclear—has been undercut by PERB's two recent decisions construing the statute. *See supra* at 6.

(quoting *Thomas,* 220 F.3d at 1139). "The plaintiffs' allegations must be specific enough so that a court need not 'speculate as to the kinds of political activity the [plaintiffs] desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication.'" *Id.* (citation omitted). Plaintiffs have not satisfied this burden.

Plaintiffs have not identified with specificity any particular speech (1) that they intend to engage in or have refrained from engaging in; (2) that would be attributable to a public employer and thus regulated by §3550; *and* (3) that also would be protected by the First Amendment. Plaintiffs conceded below that the "public employers" that §3550 regulates have no First Amendment rights that the statute could violate. 2-ER-129-130; *see also infra* at 30-31. Plaintiffs themselves similarly have no First Amendment rights to say whatever they wish *on behalf of* a public employer. *Infra* at 29-32. Plaintiffs thus must base their challenge to §3550 on allegations that they are suffering a "chill" to their *personal* speech because they intend to engage in speech as an individual that is both protected by the First Amendment and regulated by §3550. They have failed to present any specific concrete example of such intended speech.

Plaintiffs make vague assertions that "it is unclear" to them "which statements about union membership might 'deter or discourage' under Section 3550," and they assert that their uncertainty "has caused [them] to refrain from

sharing opinions or responding to constituents," but they provide no detail about the factual contexts in which they allege they would like to speak or the actual statements they claim they would like to make. *E.g.*, 3-ER-572 ¶¶9-11; 3-ER-574 ¶17 (asserting that Plaintiff "feel[s] unable to communicate information related to the Supreme Court's decision in *Janus*," without identifying what "information" he wants to "communicate" or how); 3-ER-552 ¶20 (asserting that Plaintiff "worr[ies] that any statement I might make" about a hypothetical bargaining failure or strike "might be construed" as subject to §3550).[11]

Such general assertions do not contain sufficient "details about [Plaintiffs' intended] speech such as 'when, to whom, where, or under what circumstances,'" to present a concrete dispute for the Court to adjudicate. *Lopez*, 630 F.3d at 787. Plaintiffs contend that they have provided "details about what they would say, when they would say it, to whom they would say it, and in what context they would say it," with a string cite to their declarations. AOB at 59. But Plaintiffs'

[11] As a further example, Plaintiff Ferguson asserts that, because of the existence of §3550, "I avoid comments that truthfully call attention to positions or actions of the union that are unpopular with public employees and thus might discourage them from joining or remaining in the union. I also refrain generally from comments about unions …." 3-ER-559 ¶7. These generalized assertions do not describe the actual statements that Ferguson claims she wants to make, and they are devoid of any factual context regarding the circumstances in which she asserts she might make "comments" about unions—in particular, Ferguson does not explain if her hypothetical comments would be made *on her own behalf* or on behalf of the public employer with which she is affiliated.

declarations fail to identify any concrete set of circumstances in which a Plaintiff intends to engage in speech that is both regulated by §3550 *and* protected by the First Amendment. As the District Court recognized, when Plaintiffs speak on behalf of the government, the First Amendment does not apply; and when Plaintiffs speak on behalf of themselves, §3550 does not apply. 1-ER-12; *see infra* at 29-32. Plaintiffs have provided no details describing any intended statement and its full context showing both that the statement would be attributable to the public employer and nevertheless be protected by the First Amendment.

Some Plaintiffs also assert that they fear making personal statements that are not regulated by §3550. *See, e.g.*, 3-ER-559-561 ¶¶11, 15-17 ("publicly mentioning my position on fiscal accountability and responsible public employee salaries"; "voic[ing] my approval or disapproval for a specific candidate"; making "public statements against [a union's] preferred candidate"; answering questions "[w]hile on the campaign trail … about my position towards a candidate backed by the [union]"); 3-ER-549 ¶¶8-9 (campaign statements "publiciz[ing] and criticiz[ing] controversial union positions"); 3-ER-551 ¶¶16-18 (statements of personal "beliefs" on policy matters); 3-ER-530-531 ¶¶29-30, 35 (asking union during local dinner about union's use of dues "to campaign against a ballot measure that some segments of [the union's] membership supported"); *id.* ¶36 (public discussion of legislative proposals while serving on statewide taskforces or

organizations); 3-ER-518-519 ¶¶13-14 (campaign statements "appris[ing] voters … of the union's positions on Common Core, charter schools, the importance of fiscal restraint, and other union positions"); *id.* ¶16 (discussion during board meetings of "educational policies on which the union has a position"). Plaintiffs' personal speech as candidates or legislators does not violate §3550 because it is not the speech of the "public employer." And Plaintiffs have not established (nor could they) that their speech as individuals would be attributed by PERB to the public employer with which they are affiliated.

Finally, Plaintiff Barke asserts that in June 2018, he asked the *public employer* on whose Board he then sat to "directly communicate with our roughly one thousand employees to educate them about their new rights" under the Supreme Court's then-recent *Janus* decision, but "under rules for communicating with [the school district's] employees, *the Board* first needed to reach out to the union representatives to request a joint communication." 3-ER-568-569 ¶¶14-16 (emphasis added). Nothing prevented Barke from advocating for his preferred policy position by making this request. The requirements for mass communications from a "public employer" that Barke criticizes are not found in §3550 (the statute Plaintiffs challenge), but in Cal. Gov. Code §3553(b).[12] And limitations on official

[12] "If a *public employer* chooses to disseminate mass communications to public employees … concerning public employees' rights to join or support an

communications from "the Board" as a whole—i.e., from the "public employer" government entity—do not implicate the First Amendment. *Infra* at 29-32.

B. Plaintiffs' attempts to avoid *Lopez* and *Leonard* are meritless.

Despite conceding that they face no threat that §3550 could be enforced against them, Plaintiffs argue that they have standing to bring this pre-enforcement challenge because, Plaintiffs contend: (1) they have a First Amendment right to speak *on behalf of* their government agencies; (2) as elected government officials, part of their official role is to freely express their personal views, and §3550 chills that expression; (3) they cannot conclusively know or control in advance when they will be acting and speaking on behalf of the government; (4) they fear "reputational" harm if they cause a public employer to violate §3550; and (5) they might someday be subject to PERB enforcement order as a public employer's agent. None of these arguments establishes Plaintiffs' standing to bring this pre-enforcement challenge.

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employee organization, or to refrain from joining or supporting an employee organization, it shall meet and confer with the exclusive representative concerning the content of the mass communication." Cal. Gov. Code §3553(b) (emphasis added).

1. Section 3550's regulation of government speech does not implicate the First Amendment.

Plaintiffs appear to contend that they have standing to challenge §3550 because the statute regulates their speech when they speak *on behalf of* a public employer. But public employees and officials suffer no *personal* injury when the government regulates its own speech. *Cf. Leonard*, 12 F.3d at 888; *Bender*, 475 U.S. at 543-44. Plaintiffs have no constitutional right to say whatever they wish when speaking on behalf of a public entity; rather, the government can determine its own message. "[W]hen the government speaks it is entitled to promote a program, to espouse a policy, or to take a position," and "it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207-08 (2015). "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

Thus, California is free to determine, as a matter of policy, that the government will not "deter" or "discourage" union membership, just as the government may choose to refrain from "promoting" drug use, "discouraging" voting, or "encouraging" abortion. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 180, 193 (1991) (upholding rule prohibiting recipients of federal funds from "encourag[ing], promot[ing] or advocat[ing] abortion as a method of family

planning," because "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest").

Through §3550, the California Legislature has directed the State's own political subdivisions regarding what activities the *government* will or will not undertake. This is something the Legislature may do.[13] "Political subdivisions of States—counties, cities, or whatever—… [are] subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions," and "the State may withhold, grant or withdraw [their] powers and privileges as it sees fit." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362 (2009) (citations, internal quotation marks omitted). "[A] political subdivision '… has no privileges or immunities under the federal constitution

[13] Myriad statutes regulate public agencies in ways the Legislature could not, consistent with the First Amendment, regulate individuals acting in their personal capacities. *See, e.g.*, Cal. Gov. Code §3543.5(d) (unlawful for "public school employer" to "in any way encourage employees to join any [employee] organization in preference to another"); *id.* §3506.5(d) (same for "public agency"); Cal. Pub. Util. Code §21241 (transportation department "shall encourage, foster, and assist in the development of aeronautics in this state and encourage the establishment of airports and air navigation facilities"); Cal. Educ. Code §8358(c)(1) ("County welfare departments … shall encourage all [childcare] providers … to secure training and education in basic child development."); Cal. Health & Safety Code §11998.1(f)(3) (Legislature's intent is that within five years "[e]very county public social service agency has established policies that discourage drug and alcohol abuse and encourage treatment and recovery services").

which it may invoke in opposition to the will of its creator.'" *Id.* at 363 (citation omitted); *see also City of San Juan Capistrano v. Cal. Pub. Utilities Comm'n*, 937 F.3d 1278, 1280 (9th Cir. 2019) ("political subdivisions lack standing to challenge state law on constitutional grounds in federal court").

In short, the State's regulation of the government speech of its own subdivisions ("public employers") does not implicate the First Amendment. *See, e.g.*, *Bailey v. Callaghan*, 715 F.3d 956, 958, 960 (6th Cir. 2013) (rejecting First Amendment challenge to state law that prohibited "public school employer" from "assist[ing]" union "in collecting dues or service fees," because that law "merely directs one kind of public employer to use its resources for its core mission rather than for the collection of union dues. That is not a First Amendment concern.").[14]

Plaintiffs contend that the established principle that the First Amendment does not apply to government control of the speech of its own agents does not apply here because, Plaintiffs assert, the State is "seek[ing] to exert control over speech, not in its capacity as employer, but as sovereign." AOB at 13. To the contrary, §3550 does not "restrict the speech of the public at large." *Waters v.*

[14] Plaintiffs' contentions that §3550 constitutes "viewpoint discrimination" are beside the point. The government can choose what viewpoint the government will espouse. In any event, PERB has construed §3550 "even-handedly" to prohibit actions that tend to influence a public employee's choice "whether or not" to support a union. *See supra* at 6.

Churchill, 511 U.S. 661, 675 (1994) (plurality). It governs the speech of the government itself. *See Utah Educ. Ass'n v. Shurtleff*, 565 F.3d 1226, 1231 (10th Cir. 2009) ("[Plaintiffs'] position rests on the proposition that when Utah regulates *local* public employers' payrolls, it is not managing its internal operations but is acting as a lawmaker with the power to regulate. … This is precisely the proposition the Supreme Court rejected in *Ysursa* ….") (emphasis in original).

Thus, to the extent that Plaintiffs intend to speak in their official capacities on behalf of the government, the State can regulate that government speech and in doing so it causes Plaintiffs no personal harm. It is well-established that a government employee has no First Amendment right to say whatever she wishes while speaking for the government. *See Garcetti v. Ceballos*, 547 U.S. 410, 418, 421 (2006) (while First Amendment may apply when public employee "sp[eaks] *as a citizen* on a matter of public concern," First Amendment does not apply "when public employees make statements pursuant to their official duties"—i.e., when they speak on behalf of the government) (emphasis added). The same is true of any other individual when acting as the government's agent; the State is free to control its own message. *See id.* at 422 ("Official communications have official consequences, creating a need for substantive consistency and clarity.").

2. Plaintiffs' role as elected officials does not entitle them to challenge §3550.

Plaintiffs argue that, as elected government officials, they are not like ordinary government employees, because part of their official role is to express their own views, as opposed to the official views of the government. AOB at 46-48. For example, a United States Senator is acting in an official capacity when the Senator expresses views on the floor of the Senate during legislative debates or in meetings with constituents, but those views are not necessarily the views of the United States government. Plaintiffs urge that, in such contexts, elected government officials have a First Amendment right to freely express their own views even though they are being expressed as part of their official duties, not in their personal capacities. Assuming that view of the First Amendment is correct, however, Plaintiffs do not establish that PERB and the state courts, in interpreting and applying §3550, would *fail to recognize* that there are contexts in which elected government officials' duties include expressing their own policy views and would *wrongly* attribute that speech to the public employer itself.

Section 3550 applies by its plain terms only to the actions of the "public employer." To the extent there are contexts in which elected officials, when expressing views in performing their official duties, are *not* the "public employer," the statute does not apply. *Cf. Cal. Teachers Ass'n v. San Diego Cmty. Coll. Dist.*, 28 Cal.3d 692, 701 (1981) (a legislator's statement about the intended meaning of

a statute is just a "personal opinion," not admissible evidence of the Legislature's intent). Section 3550 does not prohibit Plaintiffs from expressing their own personal policy preferences during legislative or electoral debates or in meetings with constituents. Reasonable observers understand the difference between an official expressing personal policy views and an official speaking for or threatening to take action on behalf of the government. *Supra* at 14-19, 26-27.

But Plaintiffs and other elected officials have no special right to leverage the official powers or public resources that the government bestows on them and to speak *on behalf of the government* to advance policies the government does not wish to advance. The Supreme Court has squarely "rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011) ("[A] legislator has no right to use official powers for expressive purposes."). For example, Plaintiffs contend that they each "have been delegated [by the government] the responsibility … to oversee (or to engage in) collective bargaining negotiations." AOB at 22. The First Amendment is not implicated by the government's control over the positions its own agents take in collective bargaining.

Plaintiffs rely on inapposite cases that involved speech-restrictive regulations that applied directly to elected officials and subjected those elected

officials to personal sanctions. AOB at 27-28, 47-48.[15] None of those cases bears on the State's regulation of the government speech of its own political subdivisions, where individual officials are not subject to any personal liability. *See City of El Cenizo v. Texas*, 890 F.3d 164, 185 (5th Cir. 2018) (while regulation of elected officials' *personal* speech is subject to First Amendment scrutiny, "[i]n

[15] *See Bond v. Floyd*, 385 U.S. 116, 118 (1966) (Georgia House of Representatives excluded "elected Representative[] from membership because of his statements … criticizing the policy of the Federal Government in Vietnam …"); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (rejecting claim that sought to impose civil liability on individual legislators for participating in official legislative committee conducting legislative investigation); *Jenevein v. Willing*, 493 F.3d 551, 557 (5th Cir. 2007) (state court judge was personally disciplined by commission on judicial conduct through public censure); *Velez v. Levy*, 401 F.3d 75, 97 (2d Cir. 2005) (claim that elected official was removed from office in retaliation for her stated political views); *Holloway v. Clackamas River Water*, 2014 WL 6998084, at *2-3 (D. Or. Dec. 9, 2014) (official received personal public censure and was removed from office); *Rangra v. Brown*, 566 F.3d 515, 522-23 (5th Cir. 2009) (challenge to open meeting law that imposed criminal penalties on individual officials), *vacated and dismissed as moot on reh'g en banc*, 584 F.3d 206 (5th Cir. 2009); *Zimmerlink v. Zapotosky*, 2011 U.S. Dist. LEXIS 53186 (W.D. Pa. Apr. 11, 2011), *adopted*, 2011 U.S. Dist. LEXIS 53189 (W.D. Pa. May 18, 2011) (board member was personally excluded from meetings and denied access to government resources); *Melville v. Town of Adams*, 9 F.Supp.3d 77, 102 (D. Mass. 2014) (board member received personal public censure and had access to town departments restricted); *Conservation Comm'n of Town of Westport v. Beaulieu*, 2008 WL 4372761, at *4 (D. Mass. Sept. 18, 2008) (claim that defendants dissolved commission and appointed new commissioners, effectively removing plaintiffs from office, in retaliation for protected speech); *Willson v. Yerke*, 2013 WL 6835405, at *9 (M.D. Pa. Dec. 23, 2013), *aff'd*, 604 F.App'x 149 (3d Cir. 2015) (plaintiffs personally denied access to town resources).

the context of *government* speech, a state may endorse a specific viewpoint and *require government agents to do the same*") (second emphasis added).

In sum, Plaintiffs do not have the right to speak on behalf of the government without any consequences *for the government*. Under *Leonard*, they cannot manufacture standing for a pre-enforcement challenge by alleging that the government's regulation of its own government speech causes them *personal* harm.

3. The application of standard agency principles does not cause Plaintiffs Article III injury.

Plaintiffs also attempt to distinguish *Leonard* by asserting that in *Leonard* this Court announced a *sui generis* rule under which the plaintiffs had the "unilateral and conclusive authority to decide when their statements [we]re made in their personal capacity versus their official capacity." AOB at 14. The argument is meritless. *Leonard* applied the standard rules of agency, and those same rules determine when an individual speaks on behalf of a public employer for purposes of §3550. *Supra* at 16-18.

In *Leonard*, this Court explained that the challenged collective bargaining provision "will be triggered only if the plaintiffs speak on behalf of the Union," and "[t]hus, the only chill implicating the First Amendment here is on the speech of these *agents when they act under authority from their principal*, the Union." 12 F.3d at 889 (emphasis added). The Court then cited Restatement (Second) of

Agency §§26–27, 33 (1958), which sets forth the same longstanding agency principles of actual or apparent authority that apply under §3550. *See* Cal. Civ. Code §§2295, 2298-2300; *supra* at 16-18. Plaintiffs' contention that the Court's decision in *Leonard* involved—and conclusively turned on—the Court's unspoken adoption of a unique standard contrary to the accepted law of agency is simply wrong.

Plaintiffs note that the determination of whether an agent is acting or speaking on behalf of her principal depends on the particular facts, but that is commonplace in the law (whether the principal is the government or some other person or entity). *See, e.g.*, *van't Rood v. Cty. of Santa Clara*, 113 Cal.App.4th 549, 571-73 (2003) (discussing general agency principles). Government employees and contractors routinely must distinguish between their personal speech and their speech on behalf of the government. *See Garcetti*, 547 U.S. at 418. The applicable agency standards are familiar. Public employers—the only entities subject to regulation under §3550—can avoid being held liable for speech by individual board members by not giving those board members actual or apparent authority to speak on their behalf regarding the communications at issue. *See van't Rood*, 113 Cal.App.4th at 571 (actual agency only exists when principal and agent both agree that agent will act "on [the principal's] behalf and subject to his control"); *Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, 59 Cal.App.4th 741, 747-48 (1997)

(ostensible or apparent agency only exists if *principal* (here public employer) takes action to cause third party to reasonably believe that alleged agent has authority to act on behalf of principal).

It should not be a mystery to Plaintiffs when a public employer is controlling their speech or has taken action to cause others to reasonably believe they have authority to act on behalf of the public employer—e.g., if they are appointed by the public employer to speak as the employer's bargaining agent, *supra* at 34—and when instead they are speaking as individuals free from the public employer's control and imprimatur. It is also commonplace for individuals who are concerned that their personal speech might wrongly be attributed by listeners to an organization with which the speaker is affiliated to make clear that they are speaking solely on their own behalf. Nothing prevents Plaintiffs from following that common practice.

That it might be possible to conjure hypothetical situations in which the agency question is disputable does not establish the "*genuine* threat of *imminent*" personal harm that would be necessary for an agent to bring a pre-enforcement challenge to a regulation that applies only to the principal. *Wolfson*, 616 F.3d at 1063; *see Leonard*, 12 F.3d at 889. The same issue that Plaintiffs highlight was present for the union leaders in *Leonard*, and the same issue is present in *Garcetti* and every case addressing whether a public employee has engaged in personal

speech that is protected by the First Amendment or speech on behalf of the government that is not. *See supra* at 14-15, 32. Accepting Plaintiffs' expansive theory would mean that the government could never regulate its own message—despite the established Supreme Court law regarding government speech—because individual government officials, employees, contractors, or other potential agents could claim that any such regulation "chilled" their personal speech rights so long as they could think up hypothetical circumstances in which it is not immediately apparent to them whether they would be speaking for themselves or for the government.[16]

4. Plaintiffs' speculative fears of "reputational" harm do not establish standing.

Plaintiffs also rely on *Meese v. Keene*, 481 U.S. 465 (1987), to assert that §3550 causes them personal injury even though the statute cannot be enforced against them. AOB at 38-39. But *Meese* is inapposite. The plaintiff there challenged a statute that imposed labeling and reporting requirements on certain films and officially designated those films as "political propaganda." *Id.* at 469-72. The plaintiff could not display the films as part of his own personal political

[16] Plaintiffs cite *Thomas v. Collins*, 323 U.S. 516 (1945) (AOB at 28-29), but in that case the statute restricted individual speech, and the plaintiff was personally held in contempt for violating a restraining order and penalized with three days in jail and a $100 fine. *Id.* at 523-24. In any event, the court decision does not discuss standing.

speech without the government-required disclosures, or free from the government-imposed "political propaganda" designation. The case was not a pre-enforcement challenge; the statute already had been implemented in a manner that curtailed the plaintiff's protected speech.

The Supreme Court held that the plaintiff had established Article III injury because he submitted "detailed affidavits" establishing that he wanted to display the films but his personal "exhibition of films that have been classified as 'political propaganda' by the Department of Justice would substantially harm his chances for reelection and would adversely affect his reputation in the community." *Id.* at 473-74. As the Supreme Court has explained, "[u]nlike the present case, [*Meese*] involved 'more than a "subjective chill"' based on speculation about potential governmental action; the plaintiff in that case was unquestionably regulated by the relevant statute, and the films that he wished to exhibit had already been labeled as 'political propaganda.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013). There is no similar forced disclosure requirement here, and §3550 does not impose any requirements or official labels on Plaintiffs' individual speech.

Plaintiffs contend that, like the plaintiff in *Meese,* they have suffered injury because they "fear" that a finding that a public employer had violated §3550 based on a Plaintiff's actions on behalf of that employer might injure that Plaintiff's

reputation, ability to serve as "effective" elected officials, or ability to be reelected. AOB at 22-23. The argument fails for multiple reasons.

First, Plaintiffs' contention that they will suffer reputational or electoral harm is entirely unsupported. Plaintiffs' complaint contains no allegations that any Plaintiff faces any threat of harm to her "reputation" or ability to win reelection. *See generally* 4-ER-627-644. Plaintiffs' declarations similarly say nothing at all about alleged harms to their "reputation" or electoral prospects. *See generally* 3-ER-516-585. Plaintiffs contend that the risk to their reputation is "obvious." AOB at 41, 50. But standing depends on facts, not the contentions of counsel. *Cf. Meese*, 481 U.S. at 473-74 (finding standing based on "detailed affidavits," including based on polls and expert analysis, that plaintiff's professional reputation and ability to obtain reelection would be harmed if plaintiff personally displayed films that government had labeled as "political propaganda").

Plaintiffs' contention that their ability to serve as "effective" elected officials is similarly unsupported. The argument is simply another way to say that Plaintiffs allege that they personally fear how §3550 might someday be interpreted or applied to a government entity—not to them personally. That alleged "chill" based on nothing more than personal speculation does not support standing, for all the reasons explained *supra* at 20-23.

Second, even if Plaintiffs had supported their contentions regarding "reputational" harm or their "ability to get reelected" (either in their complaint or their evidence), the attenuated causal chain they attempt to identify is too remote, contingent, and speculative to establish Article III injury. They rely on the hypothetical possibilities that they might engage in unspecified activity; PERB might attribute that conduct to a public employer; PERB then might conclude that the public employer had violated §3550 as a result of that conduct on the public employer's behalf; relevant members of the public then might become aware of that outcome; and then that knowledge might diminish the Plaintiff's reputation (rather than enhance that reputation among constituents who, like Plaintiffs, oppose unions). That string of conjectures is far removed from the necessary showing that Plaintiffs face a "*genuine* threat of *imminent*" harm resulting from enforcement of §3550. *Wolfson*, 616 F.3d at 1063 (emphases in original; citation omitted).[17]

[17] In *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 466 (5th Cir. 2020) (AOB at 39), the plaintiff suffered actual injury when the defendant community college board of which he was a member adopted a resolution publicly censuring him, directing him to cease and desist from further "inappropriate conduct," and threatening that "any repeat of improper behavior" would constitute "grounds for further disciplinary action by the Board." *Id.* at 493-94. In *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 & n.13 (1979) (AOB at 39), the challenged consumer publicity statute prohibited the plaintiffs' individual speech and imposed the threat of direct criminal penalties and injunctive relief for violations. Plaintiffs are not threatened with any similar personal harms. They have

Third, and in any event, any "chill" Plaintiffs might assert based on the possibility that their reputations could be affected by the State's regulation of its own political subdivisions cannot create standing, because such regulation of the government itself does not implicate the First Amendment at all. *Supra* at 29-32. In *Leonard*, this Court reasoned that "[t]he individual plaintiffs' speech could be affected only if, as individual union members, they wished to claim authority to speak for the Union when they did not possess it. However, such a 'chill' does not implicate First Amendment rights at all: '[T]here is no constitutional value in false statements of fact.'" 12 F.3d at 889 (quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974)). Similarly, there is no constitutional value in Plaintiffs' apparent desire to speak *on behalf of a public employer* without complying with state law and without any repercussions to that public employer. *Supra* at 29-32.

5. Plaintiffs' speculation that a future enforcement order might apply to them as agents of a public employer does not establish standing.

Plaintiffs finally argue that they have standing because someday they might be subject to a PERB enforcement order, if a public employer were found to have violated §3550 based on one of the Plaintiffs' actions on behalf of that employer. AOB at 41-42. Plaintiffs have failed to establish that they face any such actual

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alleged no reasonable possibility that PERB could or would "censure" or punish them personally for causing a public employer to violate §3550.

threat. They contend that in *County of Riverside*, PERB issued an order that applied to individual elected board members. AOB at 26. In fact, PERB's order applied only to "the County, its governing *board* and its *representatives*," not to individual board members who were not acting as the County's agents. *County of Riverside*, PERB Decision No. 2119-M, at 24 (emphases added); *see supra* at 18 n.6.

Plaintiffs also cite *Boling* (AOB at 27), but in that case PERB similarly issued an order applicable to a public employer (there a city) and did not purport to directly bind any individuals in their personal capacity. In *Boling*, PERB held that the defendant "city was charged with the mayor's conduct under principles of statutory and common law agency," where the mayor (who was the city's designated collective bargaining representative) sought to circumvent meet and confer requirements by pursuing pension changes outside the collective bargaining process on behalf of the city. 5 Cal.5th at 909. The facts made clear that the mayor "directly exercis[ed] his executive authority on behalf of the city." *Id.* at 919. Given this, the California Supreme Court affirmed PERB's holding that the City had violated a statutory provision that "expressly impose[d] the duty to meet and confer on '[t]he governing body of a public agency, or such boards, commissions, *administrative officers or other representatives as may be properly designated by law* or by such governing body.'" *Id.* at 917 (quoting Cal. Gov. Code §3505)

(emphasis in *Boling*). The mayor faced no personal liability, and in any event, §3550 contains no similar language directly regulating individual employer representatives.

Plaintiffs have not alleged that they face any realistic threat of being subject to a PERB enforcement order in their personal capacity. And if in some hypothetical future proceeding PERB were to impose a remedial order that directly applied to a Plaintiff as an individual (there is no evidence suggesting PERB might do so), that Plaintiff would be free to challenge that imagined order in the California courts. *See* Cal. Gov. Code §3509.5.

Plaintiffs have also failed to allege any imminent possibility that PERB might issue a cease and desist order against a public employer that would bind a Plaintiff acting in an official capacity as the public employer's agent. *Supra* at 20-23. But even if there were such a possibility, the government's regulation of a public employer's agents does not implicate those agents' *personal* First Amendment rights, for all the reasons discussed *supra* at 14-19.

Accepting Plaintiffs' argument that they have standing to challenge §3550 because there is a hypothetical possibility that PERB might someday issue an enforcement order against a public employer that binds the public employer's agents *when acting as agents* (not when acting in their personal capacity) would mean that every public official, employee, contractor, or other potential agent

would have standing to challenge *any* law that governs a public entity. Under Federal Rule of Civil Procedure 65(d)(2)(B), every federal injunction issued against a public entity binds the entity's "officers, agents, servants, employees, and attorneys." The bare fact that courts have the power to issue injunctions prohibiting the government from violating a law does not mean that every government officer, employee, attorney, or other individual who might someday act as a government entity's agent has personal standing to challenge every law that applies to that government entity. *Cf. Bender*, 475 U.S. at 543-44 & n.6 (school board member had no personal standing to appeal order that bound him only in his official capacity).

II. Plaintiffs' Claims Are Not Ripe.

The dismissal of Plaintiffs' complaint can independently be affirmed because, as the District Court correctly held, Plaintiffs' claims are not ripe. 1-ER-17-20. Plaintiffs' claims do not satisfy constitutional ripeness principles for the same reasons discussed above. *See Thomas*, 220 F.3d at 1138 ("The constitutional component of the ripeness inquiry" often "coincides squarely with standing's injury in fact prong."). Plaintiffs' claims also are barred by the "prudential component of the ripeness doctrine." *Id.* at 1141. "In evaluating the prudential aspects of ripeness, [the Court's] analysis is guided by two overarching considerations: 'the fitness of the issues for judicial decision and the hardship to

the parties of withholding court consideration.'" *Id.* (citation omitted). Both considerations militate against review.

A. Plaintiffs failed to present a concrete factual context for the courts to evaluate their claims.

Plaintiffs' claims are not "fit" for judicial review because they are "devoid of any specific factual context." *Thomas*, 220 F.3d at 1141. A court "cannot decide constitutional questions in a vacuum." *Alaska Right to Life*, 504 F.3d at 849. "[A] party bringing a pre[-]enforcement challenge must … present a 'concrete factual situation … to delineate the boundaries of what conduct the government may or may not regulate without running afoul' of the Constitution." *Id.* (citation omitted). As explained *supra* at 23-28, Plaintiffs have not presented a concrete factual situation to support their claims, and whether the First Amendment applies to particular "speech" Plaintiffs might engage in depends on all the facts. Thus, "the First Amendment challenge presented in this case requires an adequately developed factual record to render it ripe for … review. That record, at this point, does not exist." *Thomas*, 220 F.3d at 1142; *see Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 510-11 (9th Cir. 1991) (First Amendment claims were not ripe where they were based on "a sketchy record and with many unknown facts"; even where plaintiffs have Article III standing, "the exercise of jurisdiction without proper factual development is inappropriate").

As the District Court recognized, that §3550 had never been construed by PERB at the time the District Court considered the motion to dismiss also weighed against finding Plaintiffs' claims "fit" for review. In *Alaska Right to Life*, for example, a pre-enforcement First Amendment challenge to a state judicial ethics code was not ripe because there was no evidence that the state commission authorized to inquire into potential violations had "contemplated that such an inquiry might be warranted" in the circumstances plaintiffs said raised constitutional concerns; there was no "reason to expect the Alaska Supreme Court to adopt and act upon a recommendation that ran afoul of the First Amendment"; and, importantly, "[t]he fact that Alaska's high court ha[d] not yet had an opportunity to construe the canons at issue … or to apply them to the speech [plaintiffs] hope[d] to solicit further militate[d] in favor of declining jurisdiction." 504 F.3d at 849-50; *see also Babbitt,* 442 U.S. at 310 (adjudication of First Amendment challenge to state statute prohibiting union from "induc[ing] or encourag[ing]" consumer not to purchase or use certain products "by the use of dishonest, untruthful and deceptive publicity" "should await an authoritative interpretation of that limitation by the Arizona courts"). There are especially strong reasons here to allow PERB and the California courts the opportunity to interpret §3550 because the State is regulating its own political subdivisions.

PERB's two recent *Regents* decisions interpreting §3550 do not make Plaintiffs' claims any more "fit" for judicial review. The PERB decisions do not involve claims based on the arguably personal speech of public officials or employees. And PERB's interpretation of §3550 undercuts the primary grounds on which Plaintiffs seek to attack the statute. Plaintiffs' complaint alleges that §3550 is not viewpoint neutral and is unconstitutionally vague and overbroad because the statute does not define the terms "deter or discourage." 4-ER-642-643 ¶¶40-42. But PERB has now opined on what "deter or discourage" means in the context of §3550. *See Regents*, PERB Decision No. 2755-H, at 21. And PERB has construed the statute "even-handedly," to prohibit employer actions that tend to influence either way an employee's free choice "whether or not" to support a union. *Id.* at 3-4. Plaintiffs' claims that they are suffering injury because the statute is vague and one-sided are now contrary to PERB's interpretation and even more hypothetical, speculative, and ungrounded in concrete facts.

B. Declining to adjudicate Plaintiffs' claims will cause them no hardship.

Declining to adjudicate the issues here until "a real case arises" will cause Plaintiffs no hardship. *Thomas*, 220 F.3d at 1142 ("[T]he absence of any real or imminent threat of enforcement, particularly criminal enforcement, seriously undermines any claim of hardship."). Plaintiffs cannot be held in violation of §3550 because the statute, by its terms, only applies to public employers. *Supra* at

14-19; *see Alaska Right to Life*, 504 F.3d at 851 (plaintiffs faced no hardship from dismissal of their claims on prudential standing grounds where "[n]ot only is there a lack of any credible threat of enforcement, but neither plaintiff is potentially subject to enforcement of the Code. … '[T]he self-censorship door to standing does not open for every plaintiff. The potential plaintiff must have an "actual or well-founded fear that the law will be enforced *against him or her*."'") (citation omitted; emphasis in original).

On the other side of the balance, "by being forced to defend [§3550] in a vacuum and in the absence of any particular" application of that statute or any allegation by a charging party that the statute has been violated under a concrete set of facts, "[Defendants] would suffer hardship were [the Court] to adjudicate this case now." *Thomas*, 220 F.3d at 1142.

C. Plaintiffs' arguments about prudential ripeness are meritless.

Plaintiffs argue that "[i]n the First Amendment context, when a plaintiff asserts that his speech was chilled, prudential considerations are satisfied …." AOB at 56 (citing *Canatella v. California*, 304 F.3d 843 (9th Cir. 2002)). To the contrary, both this Court and the Supreme Court have declined to hear pre-enforcement First Amendment challenges when, on the particular facts, postponing adjudication of the plaintiffs' claims would not cause the plaintiffs serious hardship. *See Alaska Right to Life*, 504 F.3d at 849-50 (plaintiffs' First

Amendment challenge to code that did not apply to plaintiffs directly was not ripe); *Babbitt,* 442 U.S. at 310 (adjudication of plaintiffs' First Amendment challenge to state statute prohibiting union from "induc[ing] or encourag[ing]" consumer not to purchase or use certain products "by the use of dishonest, untruthful and deceptive publicity" "should await an authoritative interpretation of that limitation by the Arizona courts").[18]

Canatella did not hold that assertions of chill always satisfy prudential ripeness considerations. Rather, the Court held that, on the particular facts, an attorney who had been subject to dozens of previous sanctions orders had standing to challenge state bar statutes and a rule of professional conduct, given that the evidence established a "strong likelihood Canatella may again face discipline under the challenged provisions. His threat of future prosecution [wa]s not merely hypothetical and conjectural, but actual." *Canatella*, 304 F.3d at 853; *see id.* at 854 n.14 (emphasizing that "we do not imply that the mere existence of the challenged provisions gives rise to an injury sufficient for standing purposes. Instead, it is Canatella's history with the California Bar, his continuing activities as a zealous

[18] Plaintiffs attempt to distinguish *Alaska Right to Life* by asserting that the plaintiffs faced no risk of discipline under the challenged statute but here "there are actual PERB charges and cases underway!" AOB at 58. As previously explained, Plaintiffs do not identify any PERB charges under §3550 *against Plaintiffs*, the public employers with which Plaintiffs are associated, or indeed against *any* public employer based on speech by a member of a public employer's governing board.

advocate, and the nature of his challenge to the provisions that lead us to conclude the requirements of standing are met in his complaint."). The Court went on to apply standard prudential ripeness considerations to conclude that, given the particular facts, the plaintiff's "claims do not arise in a factual vacuum and are sufficiently framed to render them fit for judicial decision"; the plaintiff "and others in his position will be harmed absent a consideration of his claims"; and "there is no better time to entertain Canatella's claims than now." *Id.* at 855. The same prudential ripeness principles counsel *against* adjudication here. *Supra* at 47-50.[19]

Plaintiffs next suggest that their claims present "purely legal" issues without the need for additional facts. AOB at 56. To the contrary, whether Plaintiffs would be acting as agents of a public employer—and thus, whether §3550 would apply to any particular activity—depends on all the facts. *Supra* at 16-18. Those facts might include actions besides the actions of Plaintiffs themselves, such as whether the public employer authorized the Plaintiff to use government resources to influence employee decisions about unionization and whether the public employer made it

[19] Plaintiffs also cite *Martinez v. City of Rio Rancho*, 197 F.Supp.3d 1294, 1305 (D.N.M. 2016) (AOB at 56-57), but there the plaintiff challenged a city ordinance that had been directly applied to her; she was pulled over and cited for violating the ordinance. Her claims did not involve assertions of subjective "chill" from a statute that could not be enforced against her, which is all that Plaintiffs rely on here.

appear that the Plaintiff was speaking on behalf of the public employer. For example, in *Boling*, the California Supreme Court spent multiple pages of its opinion discussing the facts that established the mayor was acting on behalf of the city. 5 Cal.5th at 904-09. In *Inglewood Teachers Ass'n*, 227 Cal.App.3d at 781-83, the Court of Appeal similarly discussed in detail the particular facts supporting PERB's conclusion that the school principal was not acting as an agent of the district when he engaged in the particular conduct challenged as an unfair labor practice. Plaintiffs' general, speculative assertions here are woefully devoid of similar concrete facts necessary to adjudicate their claims.

Plaintiffs' only other argument regarding prudential ripeness is to contend that the District Court should not have considered, as part of the ripeness calculus, that PERB had never construed the statute. AOB at 60-62. In *Alaska Right to Life*, however, where the plaintiffs challenged a code that did not apply to the plaintiffs themselves, this Court held that "[t]he fact that Alaska's high court ha[d] not yet had an opportunity to construe the canons at issue … or to apply them to the speech [plaintiffs] hope[d] to solicit further militate[d] in favor of declining jurisdiction." 504 F.3d at 849-50; *see also Babbitt*, 442 U.S. at 309-10 (deferring adjudication until state court had opportunity to construe challenged statute). The same considerations counseled in favor of the District Court declining jurisdiction

here. Indeed, PERB subsequently issued decisions construing §3550 that rejected Plaintiffs' interpretation of the statute. *Supra* at 6.

None of Plaintiffs' cases supports their position. In *Wolfson* (AOB at 60), for example, the plaintiff challenged certain ethics canons that already had been directly enforced against him. 616 F.3d at 1062. The plaintiffs' claims were ripe because, among other things, he challenged "restrictions on his own speech" as a former and future candidate for elected office, and he "ha[d] already sought [and received] an advisory opinion regarding the challenged canons" from a state body. *Id.* Section 3550, in contrast, does not apply directly to Plaintiffs at all. Thus, waiting for an actual concrete dispute before adjudicating the issues here will cause Plaintiffs no hardship.

In *U.S. v. Stevens*, 559 U.S. 460, 466-67 (2010) (AOB at 61), a criminal defendant argued that the statute under which he had been indicted was facially overbroad, and the Court agreed. Unsurprisingly, the Court rejected the government's contention that the statute should survive, despite the sweeping scope of its plain terms, based on the government's assertions that it would utilize its "prosecutorial discretion" and would only apply the statute "far more restrictively than its language provides." *Id.* at 480. This case involves no similar executive branch promises at odds with the statutory text itself.

Finally, Plaintiffs' other cases (AOB at 61-62) are inapposite because they involved statutes and executive orders that clearly regulated protected speech on their face. In those cases, the government could not avoid pre-enforcement challenges by suggesting that the government might construe the statutes more narrowly.[20] Here, the statute on its face does *not* regulate private conduct. The District Court's decision not to hear a pre-enforcement challenge to §3550 does not result in any significant hardship for Plaintiffs.

III. Granting Leave to Amend the Complaint Would Be Futile.

Plaintiffs argue that the District Court erred in dismissing the case without leave to amend. AOB at 62-65. But as the District Court correctly held,

[20] *See San Francisco Cty. Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 825 (9th Cir. 1987) (political party central committees had standing to challenge statute that was "clear on its face" in directly regulating the membership and speech of those committees); *Cty. of Santa Clara v. Trump*, 250 F.Supp.3d 497, 515 (N.D. Cal. 2017) (counties' standing to challenge executive order that on its face purported to restrict counties' access to federal funding was not undermined by federal government attorneys' suggestions of narrowing construction of executive order); *Frazier v. Boomsma*, 2007 WL 2808559, at *8-9 (D. Ariz. Sept. 27, 2007) (attorney general's statement that he had "no present intent to prosecute" plaintiff t-shirt seller did not divest plaintiff of standing to challenge criminal law, where "[t]he plain purpose of the legislation was to proscribe Frazier's t-shirts and the prosecutor-Defendants originally acknowledged that Frazier's conduct subjects him to the risk of criminal prosecution under the statute"); *Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson*, 236 F.3d 1174, 1192-93 (10th Cir. 2000) (State's suggested narrow construction could not overcome "statute's plain language," which "clearly covered" plaintiffs and thus imposed threat of enforcement sufficient to establish standing).

amendment would be futile. 1-ER-21; *see Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."). Plaintiffs lack standing because §3550 does not apply to them as individuals, there is no likelihood that the government will enforce the statute against them, and thus the statute, by itself, does not cause them *personal* injury. Plaintiffs cannot plead additional facts to avoid those conclusions.

During the motion to dismiss hearing, the District Court stated that the complaint's allegations of harm were "at most hypothetical" and "also very vague," and specifically asked Plaintiffs' counsel, "What concrete plan to engage in prohibited speech … could your clients allege? … [W]hat is the conduct that they are engaging in, that they intend to engage in that would -- could result in a direct harm to them?" 2-ER-38; *see also* 2-ER-36. In response, Plaintiffs' counsel did not identify any additional allegations that Plaintiffs could add to the complaint. 2-ER-37-44; *see also* 2-ER-52 (counsel for Unions: "I heard Your Honor ask the plaintiffs' counsel what plaintiffs could possibly add to their complaint in an amendment to describe an actual concrete plan to violate this statute … in a way[] that would also implicate the First Amendment. And counsel for the plaintiffs did not offer any such amendment, because there isn't one."). On appeal, Plaintiffs still have failed to identify any amendment they could make that

would cure the fundamental problems with standing and ripeness. The District Court was correct to dismiss the complaint without leave to amend.

Plaintiffs finally argue that the judgment should have stated that the complaint was dismissed without prejudice. AOB at 63 (citing *Fleck & Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100 (9th Cir. 2006)). The Unions do not dispute the point. The Court thus should affirm the dismissal of the complaint but remand with instructions to amend the judgment. *See, e.g.*, *Kelly v. Fleetwood Enterprises, Inc.*, 377 F.3d 1034, 1040 (9th Cir. 2004).[21]

CONCLUSION

The dismissal of the complaint for lack of jurisdiction should be affirmed.

Respectfully submitted,

Dated: May 26, 2021 By: /s/ Matthew J. Murray
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[21] "[D]ismissal without prejudice will have a preclusive effect on the standing issue in a future action." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218-19 (10th Cir. 2006). Otherwise stated, affirming the decision below and ordering dismissal without prejudice will "preclude[] [Plaintiffs] from relitigating the standing *issue* on the facts presented." *Id.* (emphasis in original).

STATEMENT OF RELATED CASES

The Appellee Unions are not aware of any related cases.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 20-56075

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